SUPREME COURT, U. S.

IN THE SUPREME COURT

of the

UNITED STATES

70-313

Term, 1971

No. 1858

AMBROSE DISTRIBUTING COMPANY

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Page

OPINIONS BELOW..... 1

STATEMENT OF ISSUE PRESENTED..... 2

STATEMENT OF THE CASE..... 2

The Board's findings of fact and conclusions of law..... 2

ARGUMENT..... 3

Substantial evidence on the whole record fails to support the Board's finding as to the amount of backpay due to Richard Byrd.

1. The Board improperly formulated and applied its backpay formula.. 3

CONCLUSION..... 11

AUTHORITIES CITED

Cases:

NLRB v. Ambrose Distributing Corp.
358 F.2d 319 (C.A.9, 1966)..... 3

NLRB v. Rice Lake Creamery Co.,
(CA-D of C; 1966) 53 LC 11,281..... 4

NLRB v. Robinson Freight Lines,
(CA-6; 1961) 42 LC 16,991289 F.2d 937... 4

Charlie Toppino & Sons, Inc.
151 NLRB 1638..... 6

Patriarca Store Fixtures, 12 NLRB 93..... 7

Local 1566 International Longshoremen's Association and Marvin Gould and Jack Page,
145 NLRB 134..... 7,8,9,10, 11

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AMBROSE DISTRIBUTING COMPANY
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_____

Ambrose Distributing Company, Inc., your petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the National Labor Relations Board entered on the 23rd day of March, 1971, is attached hereto and marked Appendix A.

IN THE SUPREME COURT

STATEMENT OF ISSUE PRESENTED

Whether the Board properly determined the amount of backpay due employee Richard Byrd.

STATEMENT OF THE CASE

This case was before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.), and the Board's Rules and Regulations, Series 8, (29 CFR) for enforcement of its supplemental order issued against respondent on September 30, 1969. The Board's Supplemental Decision and Order are reported at 178 NLRB No. 114. This Court has jurisdiction under Sections 10(e), (f) and Sec. 1254 of Title 28 of the Act.

THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board, in the underlying unfair labor practice proceeding found that the Company violated Section 8(a) (3) and (1) of the Act by discharging Richard Byrd and Thomas Smith to discourage union activities. 150 NLRB 1642. On March 9, 1966, the Ninth Circuit Court entered its decree enforcing in full the remedial order of the Board which, inter alia, directed the Company to offer reinstatement to Richard Byrd and Thomas Smith and to make

these employees whole for any loss of pay suffered as a result of the Company's unfair labor practices. N.L.R.B. v. Ambrose Distributing Corp., 358 F.2d 319 (C.A. 9, 1966), cert. denied, 385 U.S. 838.

The case against Thomas Smith was settled and dismissed for about one third of the amount determined by the Regional Director.

When the Company and the Board's Regional Director were unable to agree upon the amounts of backpay due the remaining employee, the Board instituted the proceeding before the Ninth Circuit Court pursuant to Section 102.52, et seq., of the Board's Rules and Regulations.

The only issue involved in this case is whether the formula suggested and used by the General Counsel in computing the backpay due the employee, Richard F. Byrd, was improper and not in accord with the law and practice of other Circuits or Courts.

ARGUMENT

1 FORMULA USED BY TRIAL EXAMINER AND GENERAL COUNSEL DISTORTED AND UNFAIR.

The Trial Examiner for some unexplainable reason reversed himself as evidenced by his remarks during the hearing and went on an unrealistic tangent wholly inconsistent with the evidence. During the hearing the Trial Examiner rebuked and challen-

ged the General Counsel's use of a distorted formula. The Trial Examiner made it clear that the formula adopted was unjustified. (Tr. 125-126)

The General Counsel was asked by the Trial Examiner for his explanation of why he would use only the 40% of the group of all employees and why he would use only the employees in the 40% who worked every pay period as a criterion for establishing what Byrd would have earned had he stayed on the job. The rule is well established that the past record of the Claimant is the proper test of what he would have earned had he stayed on the job. NLRB v. Rice Lake Creamery Co., (CA-D. of C; 1966) 53 LC 11,281. In NLRB v. Robinson Freight Lines, (CA-6; 1961) 42 LC 16,991, 289 F. (2d) 937, the following is stated:

> "Truckdriver who did not have chauffeur's license during any portion of backpay period was, nevertheless, entitled to backpay. However, because of an unusually high absence record, Board assumed such absences would have continued at same rate during his backpay period and reduced his gross loss of earnings correspondingly."

The Trial Examiner suggested that the burden of proof was upon the General Counsel to establish that the formula being used is a proper formula and the Trial Examiner suggested or hinted that if the formula adopted by the General Counsel

was not a proper formula, as in this case, then the General Counsel had not carried the burden. (Tr. Pages 125 and 126) In other words, there wouldn't be an obligation on the part of the Respondent to show a diminution in the damages or amount of backpay computed on the basis of the average of all employees if the General Counsel hadn't carried the burden. On Page 127 of the Transcript, we find the Trial Examiner asking the General Counsel the rather pertinent question:

> "In other words, what I am worrying about is your justification of taking out the lower 60% or 40% - however you figure, -- of the group as applied to this particular individual."

Again on Page 127 of the Transcript, the Trial Examiner spoke to the General Counsel as follows:

> "Let me give you an example of what I mean.== Let's take a Plant that has 10 employees, and you have 2 of them - or 20%, who normally - or lets say in your base period - just work 10 or 20 hours, whereas all the rest of them worked their normal 40 hour week. Now I can see where your theory - to include all of those 10 - would distort the average -- by including -- or if you include the 2 who just worked 10 or 15 hours. - So I can see your reason for them - but I just wonder whether or not that reasoning is applicable to this case."

The above example by the Trial Examiner fits

this case exactly. The undisputed evidence in the record shows that Byrd had an extremely poor record of earnings since the time he came to work for the Respondent and, of course, he had a poor record of employment after he was discharged.

In the Transcript from Page 49 to Page 56, the record shows that Richard F. Byrd quit his employment with the Respondent and other employers approximately 10 times, and that the last time that he came to work for the Respondent was in May of 1963 and that even during this period, he was off two weeks for an injury. Under this statement of facts, Byrd would be in the lowest catagory of workers, perhaps the low 10 or 15%. To offset this fact, the General Counsel incorrectly took the last quarters before Byrd was discharged, his best quarter in 10 years, as the basis for his prospective earnings.

The Trial Examiner refused to take cognizance of the Claimant's previous work habits and record and adopted the General Counsel's theory that since he worked fairly well in the last quarter of 1963, that should be the test for his prospective earnings. In the case of Charlie Toppino & Sons, Inc. 151 NLRB 1938, the Fifth Circuit Court held:

> "Projection of employees average earnings during period prior to his discharge was appropriate measure of gross backpay

due when it would be difficult to find counterpart employees because the employee had been used in a variety of capacities and jobs prior to his discharge".

In the case of Patriarca Store Fixtures, 12 NLRB 93, the Trial Examiner used a 12 months' average in the case of commissions. We believe the law to be well settled that the Claimant would not be entitled to any unjust enrichment or any more than he would have earned had he remained in the employ of the Respondent.

For some reason, the Trial Examiner completely ignored the case most squarely in point and almost identical to the instant case. In the case of Local 1566 International Longshoremen's Association and Marvin Gould and Jack Page, 145 NLRB 134 cited in January, 1964, the Board found the union guilty of unfair labor practice and coercion and discrimination and ordered backpay. The Board's decision was the backpay hearing following the court's decision in 122 NLRB 967, 278 Fed. 2d 883 (CA-3). Cert. was denied 364 U.S. 890. Redenied in 366 U.S. 909.

The above case involved a situation very similar to the Respondent's. The longshoremen were called up for work at various times or they bid on work at various times or they decided to not work at various and intermittent times which

is similar to the situation in this case. The Respondent testified that the employees were actually layed off from time to time if they had worked too steady. In other words, management felt they should take some time off. By custom and practice drivers were sometimes available and sometimes they were not. (Tr. 101-109 incl. See also Tr. Examiners remarks, page 124-126 incl.)

The General Counsel in the Longshoremen case, as in this case, submitted two formulas, one was to use a two quarter base system and to retain the multiplying factor, the second was to eliminate the multiplying factor but add to the individual's earnings of the one quarter base the amount by which earnings of all employees for subsequent quarters exceed their earnings in the base quarter.

In the Longshoremen case, as in this case, the individuals appear in "shapeups" at infrequent times. The net effect of either one of these yardsticks was to create as in the present case, a super group, that is a group that worked all the time at top wages during all quarters and to make the formula worse in the instant case, the General Counsel eliminated all employees who did not work in all quarters, so by this device he came up with a perfect or super group and that, of course, is why the Trial Examiner took issue with the General Counsel's distorted formula.

In the Longshoremen case, as in this case, the first computations by the Regional Director basing the backpay on the average earnings of all employees came out with a computation of $88.50 for one employee and $422.00 for the other and the Director sent backpay checks to the employees in this amount, but they refused to accept them.

In the Longshoremen case, the Trial Examiner and the Board admitted that while an exact determination may have been difficult, the General Counsel's formula with its two alternatives was both unrealistic and unfair. Since the earnings of one of the employees, as in this case, would have exceeded the highest paid of any of the employees in the super class resulting from the formula and higher than he had ever received in any period during his ten year period of employment, the Board holding that the multiplying factor used by the General Counsel distorted out of proportion the basic imbalance since the result in the case of the other employee would have exceeded by four times what he earned in the six years previous to his discharge, and that is also true in this case.

The Board concluded that:

> "The fairest formula to determine backpay was to use the average earnings of all employees, less interim earnings of Gould and Page. The force of General Counsel's contention that the earnings of an unknown number of casual laborers

> who shaped up infrequently or sporadically improperly weighted the measure was offset by the inclusion of the earnings of the highest paid employees. In view of all the uncertain factors in the record, including the final uncertainty as to frequency of shape-ups, the use of average earnings of all employees would most fairly and realistically reflect the amounts which the individuals would have earned over the -ong term covered by the specification."

As for the comparison to the Longshoremen case, we find the undisputed testimony in the record by Mr. Ambrose and his accountant that Mr. Mc-Feely, Chief Compliance Officer of the Regional Director's Office, came to the Respondent's place of business at the time the Court Order was made and took the average earnings of all employees in the proper and fair manner as suggested by the Board and Court in the Longshoremen case, and by using this formula, and be determining that the Claimant, Byrd, would have earned approximately 77.84% of what one of the steadier employees would have earned, the result computed by Mr. McFeely and the Respondent showed Byrd earned more during the interim than he would have earned had he remained in the Respondent's employ. This testimony is undisputed and as soon as the Compliance Officer discovered what the figures were and that it came out a zero balance, he changed the formula to the distorted formula of 60-40% using only a select group of drivers.

(Tr. Page 79) The proper formula is the one jointly worked out by Compliance Officer McFeely and the Respondent in the first instance and if the court agrees there would be no backpay.

CONCLUSION

In conslusion, the Respondent feels that the Claimant is entitled to compensation up to the cut-off date, on the basis of what he would have earned had he worked for the Respondent and no more.

We think the court should carefully examine the Trial Examiner's unfounded and unsupported conclusion wherein he ignores the proper formula to be used, particularly the Longshoremen case, and the formula submitted by the Respondent. The Trial Examiner arbitrarily jumped to a compromise figure suggested by the General Counsel. Respondent has been fair and wishes to continue to be fair but under the circumstances in this case, does not feel that the Claimant is entitled to any backpay under the proper formula as suggested by the Respondent and the cases cited.

Respondent believes Court should take into consideration the length of time this case has been delayed causing the unwarranted accumulation of backpay plus interest March 1966 to March 1971.

Respectfully submitted,

Eli A Weston

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
	)	No. 20,200
v.	)	
AMBROSE DISTRIBUTING COMPANY, Respondent.	)	

JUDGMENT

Before: Jertberg, Duniway and Carter, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of its supplemental order issued by it against Ambrose Distributing Company, its officers, agents, successors, and assigns on September 30, 1969. The Court heard argument of respective counsel on March 8, 1971, and has considered the briefs and transcript of record filed in this cause. March 23, 1971, the Court being fully advised in the premised, handed down its decision granting enforcement of the Board's supplemental order. In conformity therewith, it is hereby ORDERED AND ADJUDGED by the Court, that Respondent, Ambrose Distributing Company, its officers, agents, successors, and assigns, shall pay Richard F. Byrd as net backpay the amount $12,466.00, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law.

Endorsed, Judgment Filed and Entered
With costs in this Court in favor of the Board and against the respondent.

Costs: One-half claimed cost of brief of the Board. $62.07

/s/ William B. Luck, Clerk

/A TRUE COPY

ATTEST:

William B. Luck
Clerk

SO ORDERED

_____

_____

_____

Circuit Judges

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. AMBROSE DISTRIBUTING COMPANY, Respondent.	No. 20,200

(March 23, 1971)

On Application for Enforcement of a Supplemental Order of the National Labor Relations Board.

Before: JERTBERG, DUNIWAY and CARTER, Circuit Judges.

PER CURIAM:

Before us is the petition of the National Labor Relations Board for enforcement of its sup-

plemental order issued against respondent, Ambrose Distributing Company, on September 30, 1969, ordering respondent to pay its discharged employee, Richard F. Byrd, as net backpay the amount of $12,466.00, with interest at the rate of six percent per annum computed on the basis of quarterly amounts of net backpay due, less any tax withholding required by law. The Board's supplemental decision and order are reported at 178 NLRB No. 114.

The Board in the underlying unfair labor practice proceeding found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Byrd to discourage union activities. On March 9, 1966, this Court entered its decree enforcing in full the remedial order of the Board which inter alia directed the Company to offer reinstatement to Byrd and to make him whole for the loss of any pay suffered by the Company's unfair labor practice. N.L.R.B. v. Ambrose Distributing Company, 358 F.2d 319 (C.A.9, 1966), cert. denied 385 U.S. 838.

National Labor Relations Board

v.

Ambrose Distributing Company

On July 26, 1967, this Court adjudged respondent to be in civil contempt in failing to offer full reinstatement to Byrd. N.L.R.B. v. Ambrose Distributing Company, 382 F.2d 92 (C.A.9, 1967).

The specification covered a backpay period for Byrd running from March 12, 1964, the date of his discharge, until August 20, 1967, the day before his reinstatement.

The precise amount of gross backpay was computed under a comprehensive backpay formula. Interim earnings of Byrd, reduced where appropriate by travel expenses, were deducted from gross backpay yielding the net backpay due Byrd.

Respondent's main contention on this review is that the backpay formula used to compute the gross backpay is arbitrary, unsupportabel and unreasonable.

Minor contentions are that the proper cut-off date for terminating respondent's liability is January 10, 1967, and not August 20, 1967; that Byrd was not entitled to any travel allowance during the backpay period; and that during the first

two months following his discharge Byrd wilfully incurred a loss of earnings.

We have reviewed the record in light of respondent's contentions. We are unable to agree with respondent that the backpay formula adopted was arbitrary, distorted or unreasonable. In our view the amount of net backpay ordered is supported by substantial evidence on the record as a whole.

We find no merit in the minor contentions raised by respondent.

The application for enforcement of the supplemental order is granted.

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No. 70-313

In the Supreme Court of the United States

OCTOBER TERM, 1971

AMBROSE DISTRIBUTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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Washington, D.C. 20530.

EUGENE G. GOSLEE,
Acting General Counsel,
National Labor Relations Board,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-313

AMBROSE DISTRIBUTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In February 1965 the Board found that the Company, a wholesale trucking firm, had violated Section 8(a)(3) and (1) of the Act by discharging Richard Byrd and Thomas Smith to discourage their union activities; it ordered the Company, *inter alia,* to offer reinstatement and reimburse them for any loss of pay suffered as a result of the unfair labor practices. 150 NLRB 1642. The court of appeals upheld the Board's decision and enforced its order, 358 F.2d 319 (C.A. 9), certiorari denied, 385 U.S. 838. On July 26, 1967, the court of appeals held the Company in civil contempt for failing to offer full reinstatement. 382 F.2d 92, 95 (C.A. 9).

The Company and the Board's Regional Director were thereafter unable to agree upon the amounts of

backpay due and the Regional Director instituted the instant backpay proceeding. Following a hearing, the Board found that employee Byrd[1] was entitled to backpay of $12,466 plus 6 percent interest, for the period from March 12, 1964 (the date of his discharge) until August 20, 1967 (the day before his reinstatement) (R. 140, 117–119). The court of appeals upheld the award (Pet. App. 13–16).

The sole question presented by the petition is whether the Board's backpay formula was arbitrary. The method utilized involved the selection of all drivers who worked exclusively for the Company and received earnings[2] in each bi-monthly pay period of the last full quarter (the final calendar quarter of 1963) during which Byrd worked prior to his discharge. An average was taken of the earnings of all drivers in this group for each subsequent calendar quarter. From these amounts, the Board computed Byrd's backpay, deducting his earnings from other employment, reduced by appropriate travel expenses (R. 121, 124–125).

The ruling of the Board rests on substantial evidence and further review is not warranted. The Board has wide discretion to devise an appropriate backpay formula to reimburse employees for losses occasioned

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[1] At the hearing, the parties reached a settlement as to the backpay for Smith (R. 117 and n. 4). "R." refers to Volume I of the Record in the court below which is Volume 2 of the materials lodged with this Court. Volume 2 includes the decisions of the Trial Examiner and the Board. "Tr." refers to the transcript of testimony contained in Volume 2 of the record below (Volume 4 as lodged here); "Ex." refers to Exhibits filed below (Volume I as lodged with the Clerk this Court).

[2] The Company's drivers are paid only for mileage actually driven (R. 121, n. 16; Tr. 51).

by unfair labor practices. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198–199; see also, *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 and the concurring opinion of Mr. Justice Douglas at 396 U.S. 266. The representative group formula has been used by the Board in past cases (*e.g.*, *Venetian Blind Workers' Union*, 110 NLRB 780, 786; *Oman Construction Co., Inc.*, 141 NLRB 1534, 1536, affirmed, 338 F. 2d 125 (C.A. 6)) and was a reasonable basis here. It reflected normal fluctuations in earnings among seasoned drivers while at the same time prevented possible distortions which would have resulted from enlarging the group to include new, untrained and temporary employees.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EUGENE G. GOSLEE,
Acting General Counsel,
National Labor Relations Board.

JULY 1971.

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[3] Petitioner's contention that the Board's formula did not take into account Byrd's history of irregular employment at the Company ignores the evidence that, while Byrd's first four years of employment were irregular, he worked "quite steadily" for the eight months immediately preceding his discharge (R. 124; Tr. 70. 111–114; R. Ex. 3).

U.S. GOVERNMENT PRINTING OFFICE: 1971